In the
SUPREME COURT OF THE UNITED STATES
October Term, 1951

No. 474

MARION W. STEMBRIDGE,
Petitioner,

VS.

STATE OF GEORGIA
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Georgia and to the Supreme Court of the State of Georgia

BRIEF FOR THE RESPONDENT

EUGENE COOK
Attorney General of Georgia

C. S. BALDWIN, JR.
Solicitor General
Ocmulgee Judicial Circuit

M. H. BLACKSHEAR, JR.
Deputy Assistant Attorney General

LAMAR W. SIZEMORE
Assistant Attorney General

Attorneys for Respondent

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OPINION BELOW

The opinion of the Court of Appeals (R-199-202) is reported at 84 Ga. App. 413, 65 SE (2d) 819. The order of the Court of Appeals amending its record (R. 229) is not reported. The Supreme Court in denying certiorari (R. 225) wrote no opinion.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under Title 28 USC, Section 1257(3). Writ of certiorari was issued (R. 231) directed to the Court of Appeals and to the Supreme Court of Georgia. Respondent respectfully denies the jurisdiction of this Court and contends that no decision of the questions here presented has been obtained by petitioner from the highest court of Georgia empowered to act thereon.

STATUTES INVOLVED

The constitutionality of no statute is drawn into

issue by the statement of questions presented as contained in the petition for certiorari. Statutory and constitutional provisions relied upon by the respondent are printed as an appendix to this brief.

STATEMENT

Marion W. Stembridge, petitioner here, was indicted by the Grand Jury of the Superior Court of Baldwin County, Georgia, for the murder of Emma Johnekins. On trial he was found guilty of voluntary manslaughter and sentenced to serve from one to three years in the penitentiary. His motion for new trial was denied and this denial affirmed by the Court of Appeals of Georgia in *Stembridge v. State*, 82 Ga. App. 214, 60 SE (2d) 491, decided on July 12, 1950. Thereafter, on January 15, 1951, he filed a second motion for new trial (R. 175-178) under the provisions of Ga. Code, Sec. 70-303. (Appendix p. 18). This second, or extraordinary, motion for new trial, while it contains fourteen numbered paragraphs in reality is based upon a single ground, namely that since the trial and appeal petitioner has for the first time discovered new evidence. (Ga. Code, Sec. 70-204). The new evidence discovered was said by the motion to consist of a written statement (R. 178-180) given by Mary Jane Harrison, a witness for the State, to an officer of the Georgia Bureau of Investigation immediately after the homicide. It was and is contended that facts contained in this statement of witness Harrison contradict material portions of her testimony given upon the trial for murder. (R. pp. 51-79). Witness Harrison received four bullet wounds in the affray which caused the death of Emma Johnekins. At the time witness Harrison's written statement was made it is contended that she thought herself to be dying and considered her state-

ment a dying declaration. In fact she recovered and, as stated, testified on behalf of the State in the trial.

The second ,or extraordinary, motion for new trial was accompanied by a number of affidavits. The affidavits of J. E. Jones (R. 11 and R. 182), the officer before whom witness Harrison's statement was made, purports to show the conditions under which the statement was made and the subsequent possession of the statement. Five other affidavits ,Affiant Evans, R. 2; Stembridge, R. 5; Martin, R. 7; Mobley, R. 9; Ennis and Watts, R. 10), show that neither petitioner nor his counsel had knowledge of the written statement of witness Harrison at the time of trial. Other affidavits, ten in number (R. 185-196), were made by members of the jury who undertake the swear that the production of the statement of witness Harrison and disclosure of a contradiction between her evidence and written statement would have caused the return of a verdict of not guilty. This extraordinary motion for new trial was also accompanied by the statement of witness Harrison and by certain affidavits (R. 184-195) required by the terms of Ga. Code, Sec. 70-205 in motions for new trial on newly discovered evidence.

Upon the presentation of this motion and the accompanying affidavits, the trial judge on January 15, 1951, issued rule nisi (R. 198) setting the motion for hearing, restricting the hearing to affidavits and other documentary evidence, and ordering the brief of evidence in the original trial made a part of the record.

On hearing, petitioner's extraordinary motion for new trial was overruled. (R. 199). Petitioner thereupon sued out a writ or error to the Court of Appeals of Georgia, assigning error upon the overruling of this motion. (R. 1-15). The basis of the affirmation as it

appears from the opinion of the Court of Appeals (R. 199-202) is summarized in the following sentence taken from that opinion, (R. 1, bottom of page):

> "It is thus evident that the new discovered evidence is no more than impeaching in character, for which reason is falls under the inhibition of Code Section 70-204 . . ."

On June 15, 1951, petitioner filed in the Court of Appeals motion for rehearing (R. 203-210). In this motion petitioner raised for the first time a legal issue which, respondent contends, was not theretofore presented to either trial or appellate court.[1] (R. 208, third paragraph). This new issue and new contention is in substance that the State knowingly made use of perjured testimony, that of witness Harrison (R. 51-79), and that this knowing use of perjured testimony constituted a denial of due process in violation of the due process clauses of the Constitution of Georgia and of the Fourteenth Amendment to the Constitution of the United States. This motion for rehearing was summarily denied without opinion by the Court of Appeals on July 17, 1951 (R. 211). Thereupon on August 16, 1951, petitioner made application to the Supreme Court of Georgia for writ of certiorari assigning error upon the Court of Appeals' failure and refusal to note or rule upon this new due process point made in motion for rehearing (R. 222). On September 12, 1951, application for certiorari was denied by the Supreme Court of Georgia (R. 225) without opinion.

We think it not amiss in this statement of facts to

[1] Petition for ceritorari, p. 2, contains the following language: "Federal Question 1 (R. 208) was first raised in the Court of Appeals of Georgia by allegation that placing in this case of evidence known to be perjury, seeks to deprive petitioner of liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. This Federal Question was considered and decided adversely to petitioner. (R. 227-230)."

point out that as the case stood at this point neither the Superior (trial) Court, the Court of Appeals, nor the Supreme Court of Georgia had been called upon to rule on the constitutionality of Ga. Code Sec. 110-706 wherein it is provided that:

> "Any judgement . . . obtained . . . shall be set aside . . . if it shall appear that the same was entered up in consequence of corrupt and wilfull perjury; and it shall be the duty of the court . . . to cause the same to be set aside . . .; but it shall not be lawful for the said court to do so unless the person charged with such perjury shall have been thereof duly convicted. . . ."

There was no allegation in the extraordinary motion for new trial that the prosecuting officer or any other state officer had knowledge of the falsity of witness Harrison's testimony (if indeed it was false), and that he made use of this testimony knowing it to be false and perjured. There being no such allegation, there was no denial of such conduct on the part of the officers of the State.

On October 22, 1051, some 40 days after the Georgia Supreme Court's denial of certiorari, petitioner filed in the Court of Appeals a motion to amend the record so as to show that that court had decided that Ga. Code, Sec. 110-706, relating to the setting aside of judgments obtained as a result of corrupt and wilful perjury, had in fact been considered and held by the Court of Appeals to be not unconstitutional. (R. 227-228). On the same day the Court of Appeals entered an order amending its record (R. 229-230) by reciting that in passing on the motion for rehearing that court considered and decided adversely to petitioner the constitutional question as to Ga. Code Sec. 110-706 and the due

process constitutional question raised in his motion for rehearing. No further effort was made to obtain writ of certiorari from the Supreme Court of Georgia, and no effort was made to amend the record in the Supreme Court of Georgia. This Court granted writ of certiorari "to the Supreme Court of the State of Georgia and to the Court of Appeals of Georgia."

SUMMARY OF ARGUMENT

Respondent contends that this Court is without jurisdiction under 28 U.S.C. 1257(3) because the questions here presented have never been passed upon by the highest court of the State of Georgia empowered to decide. The writ of certiorari was improvidently granted and should be dismissed for that reason, and for the further reason that the decision of the Court of Appeals of Georgia rests upon non-Federal grounds adequate to support it. Notwithstanding reference the constitutionality of Ga. Code, Sec. 110-706 by the Court of Appeals the constitutionality of that statute has not been attacked by petitioner in any court, trial or appellate, and is not here drawn into question. The doctrine of *Mooney v. Hollohan*, 294 U.S. 103, does not require the reversal of the judgment of the Court of Appeals of Georgia. Respondent does not question that the doctrine of the *Mooney* case, *supra*, requires that states afford some remedy for the attack upon a judgment of conviction obtained by the knowing use of perjured testimony. Nothing decided by the Court of Appeals of Georgia or the Supreme Court of Georgia holds that no such remedy is afforded.

ARGUMENT

None of the Federal Questions here relied upon were presented to or passed on by the trial court. The Court of Appeals and the Supreme Court of Georgia were therefore without jurisdiction to consider those questions.

Petitioner's extraordinary motion for a new trial (R. 75) consists of fourteen paragraphs, but a reading of this motion shows that these separate paragraphs were not intended to represent separate and distinct grounds of the motion. Nowhere in this pleading does petitioner say that he seeks a new trial under the provisions of Ga. Code, Sec. 70-204 (Appendix p. 18), however, no inference is possible but that the motion was predicated upon this section. Ga. Code, Sec. 70-205 sets out certain procedural requirements which must be followed to assert a claim for relief under Ga. Code, Sec. 70-204, and these requirements have been, in the main, complied with. (See accompanying affidavits, R. 180-197, R. 2-5, and R. 7-14). Any lingering doubt as to the ground upon which he sought a new trial is dispelled by petitioner's bill of exceptions to the Georgia Court of Appeals (R. 1) wherein it is stated:

> "Be it further remembered that on the 15th day of January, 1951, the defendant filed an estraordinary motion for new trial on said case in the Superior Court of Baldwin County, Georgia, on the grounds of newly discovered evidence****."

Nothing contained in the trial judge's statement (R. 199) indicates a ruling upon any constitutional question. The uniform and unbroken practice of the Supreme Court of Georgia is to refuse to pass upon any constitutional issue not raised in timely manner in the

trial court. *Beckman v. Atlantic Refining Co.*, 181 Ga. 456, 182 S.E. 595; *Calhoun v. Babcock Bros. Lumber Co.*, 198 Ga. 74, 30 S.E. (2d) 872; *Miller v. State Highway Department*, 200 Ga. 485, 37 (2d) 365; Ga. Code, Sec. 6-1607 (Appendix p. 22). That court has in fact been exceedingly exacting in requiring that constitutional questions be properly raised before proceding to pass upon them. *Persons v. Lea*, 207 Ga. 384, 61 SE (2d) 832.

The jurisdiction of both Appellate Courts of Georgia is restricted by the State Constitution to the correction of errors of law of certain trial courts. *Constitution of the State of Georgia of* 1945, Article VI, Section II, Paragraph IV, (Appendix p. 19), and Article VI, Section II, Paragraph VIII (Appendix p. 20). Indeed, the Court of Appeals in its opinion accompanying judgment rendered in this case on June 5, 1951, *Stembridge v. The State*, 84 Ga. App. 413, 65 SE (2d) 819 (R. 199) expressly refers to this limitation upon its jurisdiction.

The decision of the Court of Appeals rendered on June 5, 1951, STEMBRIDGE V. GEORGIA, 84 Ga. App. 413, 65 SE (2d) 819 (R. 199) was based upon non-Federal grounds adequate to support that decision.

This point hardly requires elaboration. The logic of the opinion is compelling upon this record. No constitutional question has been presented or ruled upon by the trial court. Petitioner, there plaintiff in error, considered the case only as a motion for new trial upon the ground of newly discovered evidence in accordance with Ga. Code, Sec. 70-204. The statement of witness Harrison (R. 178), thought to be a dying declaration when made, was inadmissable for any pur-

pose other than impeachment. (See Ga. Code, Sec. 38-307 and 38-1803).

The statute expressly provides that newly discovered evidence which is only cumulative or only impeaching affords no cause for granting of a new trial. The statement was not evidence for any other purpose. Therefore, the trial court's denial of the motion and the Court of Appeals' affirmance were demanded by the language of Ga. Code, Sec. 70-204 (Appendix p. 18).

The Court of Appeals properly denied the motion for rehearing which for the first time sought to raise the constitutional or Federal Question (R. 208) because the effort to raise such a constitutional question then came too late, the Court of Appeals was without jurisdiction of the subject matter and the failure of the Court of Appeals in its opinion to decide a constitutional question not raised, and of which it lacked jurisdiction, afforded no reason for the granting of a rehearing.

The right to move for a rehearing in the Court of Appeals arises only by virtue of Rule 43 of that court, which has been sanctioned by legislative reenactment as a part of the Georgia Code of 1933, Ga. Code, Sec. 24-3643 (Appendix p. 23). The right to have a rehearing granted by the foregoing rule does not extend to such a situation. The denial of the rehearing was therefore required by the mandate of the court's rules.

We have already pointed out that the Court of Appeals has no constitutional jurisdiction to consider any question not ruled upon by the trial court. *Georgia Constitution of* 1945, Article VI, Section II, Paragraph VIII (Appendix p. 20). But there is in addition an even more stringent limitation on that

court's jurisdiction forbidding the consideration of this question. The Supreme Court of Georgia is given exclusive jurisdiction of all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question, and in all cases that involve the construction of the Constitution of the State of Georgia or of the United States. *Georgia Constitution of* 1945, Article VI, Section II, Paragraph IV (Appendix p. 19), *Georgia Constitution of* 1945, Article VI, Section II, Paragraph VIII (Appendix p. 20); *Burke v. The State*, 205 Ga. 520, 54 SE (2d) 348.

The constitutional and Federal Questions here relied on were not presented to or ruled upon by the highest Georgia court having jurisdiction to pass upon them.

In certiorari to the Supreme Court of Georgia, petitioner assigned error on the decision rendered by the Court of Appeals in the following language:

> "L. *The Court of Appeals has failed to note or rule upon applicant's claim of due process of law was violated in putting in testimony, known at the time to be perjury, against him.*
>
> "Applicant assigns error on this failure because the evidence shows that while putting in this perjured and framed testimony of Mary Jane Harrison that applicant followed Emma Johnekins into the third room and shot her while she was sitting on a trunk, the State all the time had in its files the dying declaration of Mary Jane Harrison in two separate places stated that applicant never left the first room of the apartment." (Italics added). (R. 222).

Nowhere does petitioner contend in that application for certiorari that the Supreme Court of Georgia should review and reverse the judgment of the Court of Appeals because the Court of Appeals expressly *decided* a constitutioned question. We submit that since the Court of Appeals had no jurisdiction to decide a constitutional question the Supreme Court of Georgia quite properly declined certiorari on complaint that they had *failed* to do so.

When the Supreme Court of Georgia denied certiorari on September 12, 1951 (R. 225) nothing contained in the record indicated that the Court of Appeals had in fact decided the constitutional question, and indeed petitioner then insisted that they had not done so. In *Burke v. State*, 205 Ga. 520, 54 SE (2d) 348, the Supreme Court of Georgia on a similar issue did grant certiorari upon its conclusion that the constitutional question was in fact decided, although the Court of Appeals thought otherwise. *Burke v. State*, 76 Ga. App. 612, 47 SE (2d) 116. It is fair to assume that the Supreme Court of Georgia would have followed its own decision in *Burke v. State*, 205 Ga. 520, 54 SE (2d) 348, had the record on certiorari to it shown a decision of the constitutional question or had that record even been consistent with the conclusion that there had been a decision of the constitutional question.

In the light of its decision in the *Burke* case, *supra*, we believe it may be properly argued that denial of certiorari here represented a decision by the Supreme Court of Georgia that no constitutional issue had been decided by the Court of Appeals.

Subsequent to the Georgia Supreme Court's denial of certiorari, the Court of Appeals amended its record (R.

299) to state expressly that it had considered and decided the constitutional questions. There is substantial doubt as to the jurisdiction of the Court of Appeals so to amend its record. The term of court at which its decision was rendered had theretofore adjourned (Ga. Code, Secs. 24-3801, 24-3509; Appendix p. 26), and with its adjournment respondent insists the Court of Appeals lost all jurisdiction to modify its judgment, except in accordance with the mandate of a reviewing court on certiorari granted. *McRae v. Boykin*, 54 Ga. App. 158, 35 SE (2d) 548, and the cases therein cited. Indeed, the statute law of the State forbids the filing of a motion for rehearing after the adjournment of the term, Ga. Code, Sec. 24-3649, (Appendix p. 25).

Petitioner's motion to the Court of Appeals to amend its record (R. 227) filed on October 22, 1951, after the Supreme Court's denial of certiorari forty days prior thereto (R. 225) is not provided for by either statute or rule of court. Respondent insists that this Court should accord to the Court of Appeals' order of October 22, 1951, purporting to amend its record (R. 229) no greater weight or dignity than it customarily attaches to a certificate that a federal question was decided. (See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland d.), pp. 138-141 and authorities cited). But in all events the record shows no further effort to obtain review by the Supreme Court of Georgia of the Court of Appeals' decisin after its record had been amended in the manner specified.

If this Court sees fit to give any weight or consideration to the Court of Appeals' interpretation of its opinion, then we suggest that the Supreme Court of Georgia should in like manner be allowed, if it chooses, to give similar weight to this interpretative amend-

ment of the record and frame its decision accordingly. Only when this has been done can it be said that the petitioner has obtained or sought to obtain a judgment from the highest court of the State empowered to pass upon the question.

If the right to have review of these constitutional questions by the Supreme Court of Georgia was limited to a discretionary review, this discretionary power of review must be invoked. *Regents of University of Georgia v. Carroll*, 338 U.S. 586. Here, however, review by the Supreme Court of Georgia was not so limited, but an absolute right of appeal to that Court in the first instance is afforded. *Georgia Constitution of* 1945, Article VI, Section II, Paragraph IV. Petitioner wholly failed to invoke this right of direct review. Respondent therefore respectfully insists that write of certiorari here was improvidently granted and the writ should therefore be dismissed. The jurisdiction of this Court for the foregoing reasons was not properly invoked under 28 USC 1257.

Should this Court reverse and remand the cause to the Court of Appeals of Georgia, its mandate should not require that court to enter a judgment on a constitutional issue which lies outside of its jurisdiction. The judgment of the Supreme Court of Georgia could hardly be reversed because its judgment is not upon the merits of the question here sought to be raised. If the mandate accompanying reversal of the Court of Appeal's judgment pro vides for transfer to the Supreme Court of Georgia as was done in *Burke v. State*, 205 Ga. 656, 54 SE (2d) 350, then the Supreme Court of Georgia should have an opportunity to pass on the question initially without direction of a reviewing court. Afforded such opportunity, respondent insists

that the court will have no choice but to decide upon adequate non-Federal grounds and affirm the judgment of the trial court.

While respondent has no desire to force petitioner to pursue his remedy through devious procedure, it nevertheless asserts that under the circumstances of this case the procedure followed by this Court in *Burke v. Georgia* 338 US 941 is most nearly calculated to protect the rights of all parties.

The mischief incident to permitting this constitutinal issue to be raised in the appellate court for the first time is illustrated by petitioner's contention that his charges of wilful and knowing use of perjured testimony is undenied. (Petition for certiorari, p. 5). Since the motion for a new trial contained no such allegations, no opportunity was afforded to deny them.

This case does not require or permit a decision upon the constitutionality of Georgia Code Section 110-706 which requires prior conviction of perjury before judgment based on perjured evidence may be set aside.

In *Burke v. State*, 205 Ga. 656, 54 SE (2d) 350, the Supreme Court of Georgia considered a constitutional attack upon Sec. 110-706 of the Code of Georgia (Appendix p. 18). This statute in part provides:

> "Any judgment . . . which may have been obtained or entered up, shall be set aside and of no effect if it shall appear that same was entered up in consequence of corrupt and willful purpose; . . . but it shall not be lawful for the court to do so unless the person charged with such perjury shall have been thereof duly convicted . . ."

This Court denied certiorari, *Burke v. Georgia*, 338 US 941, and entered per curiam order expressly stating

that the denial of certiorari was without prejudice to Burke's right to seek appropriate relief in the United States District Court under the doctrine of *Mooney v. Hollohan*, 294 U.S. 103. Petitioner does not here assail the statute in question. Petition for certicrari contains no separate specification of errors designated as such. Treating that portion of the petition which states the questions presented as a specification of errors (Petition, p. 3), there is still no constitutional attack upon this statute. The case at bar thus differs materially from that of *Burke v. Georgia*, 338 U.S. 941 in that here petitiner does not insist that any trial or appellate court of Georgia passed upon the constitutionality of Sec. 110-706 of the Code of Georgia, and does not, of course, assign error on their ruling in that respect.

It is true the Court of Appeals in its order amending record entered October 22, 1951 (R. 229) stated that it considered the Code Section in question and considered the decision of the Supreme Court of Georgia in *Burke v. State*, 205 Ga. 656, 54 SE (2d) 350, and that the statute did not constitute an abridgment of any rights of petitioner guaranteed to him under the Fourteenth Amendment to the Constitution of the United States. We have already commented upon the doubtful character of this "Order Amending Record." In addition, an examination of the motion for rehearing filed in the Court of Appeals and of the application of certiorari filed in the Supreme Court of Georgia, together with the bill of exceptions, clearly show that petitioner has never questioned the constitutionality of Section 110-706 in the manner required by the rule laid down in *Persons v. Lea*, 207 Ga. 384, 61 SE (2d) 832.

The decision of the Court of Appeals of Georgia is not at variance with the doctrine of MOONEY V. HOLLOHAN, 294 U.S. 103.

We believe we have demonstrated that this Court is not here concerned with the constitutionality of Ga. Code, Sec. 110-706 (Appendix p. 18). We deem it appropriate, however, to point out that that statute has been the law of Georgia for many years prior to the decision in *Mooney v. Hollohan* and those other cases of this Court giving similar broad scope to the use of habeas corpus for the purpose of going behind the record in a criminal conviction.

The statute referred to has been a part of Georgia statute law since 1833. The relief afforded by this statute goes well beyond that afforded under this Court's decision in the *Mooney* case. Under this statute all judgments based on willful and corrupt perjury may be set aside, whether or not the party obtaining such judgment had knowledge of the perjury and was a party to it. Sec. 110-706 further declares that judgments obtained by fraud, accident or mistake of the one party unmixed with negligence or fault of the other party may be set aside as a fraud upon the court. Sec. 110-706 affords relief that goes beyond the doctrine of the *Mooney* case. We submit that the required conviction of the perjury is made a condition only to the exercise of these broader rights. The Supreme Court of Georgia has followed this Court's holding in *Powell v. Alabama*, 287 U.S. 45, which was in turn based upon the *Mooney* case, *supra*. The courts of Georgia have never held that any habeas corpus patterned after the *Mooney* decision, Ga. Code, Sec. 110-706, precludes or restricts action in full accord with the decision in the *Mooney* case.

CONCLUSION

Based upon the foregoing argument, respondent respectfully urges that this Court dismiss the writ as improvidently granted. Should this Court not think it appropriate so to dismiss its writ, then we submit that the judgment of the Court of Appeals of Georgia should be affirmed.

EUGENE COOK
Attorney General of Georgia

C. S. BALDWIN, JR.
Solicitor General
Ocmulgee Judicial Circuit

M. H. BLACKSHEAR, JR.
Deputy Assistant Attorney General

LAMAR W. SIZEMORE
Assistant Attorney General

Attorneys for Respondent.

APPENDIX

Georgia Code (1933) 70-204. (6085, 6086; 1088 P.C.) Newly-discovered evidence.—A new trial may be granted in all cases when any material evidence, not merely cumulative or impeaching in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him, and shall be brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial. (Acts 1853-4, p. 47)

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Georgia Code (1933) 70-303. (6092; 1091 P.C.) Motion made after adjournment of court.—In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, 20 days' notice shall be given to the opposite party. Whenever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed. (Acts 1873, p. 47).

*****

Georgia Code (1933) 110-706. (5961) Judgments obtained by perjury.—Any judgment, verdict, rule, or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury; and it shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to

cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually vacated and set aside. (Acts 1833, Cobb, 804).

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Georgia Code 2-3704. (6502) Paragraph IV. Jurisdiction of Supreme Court.—The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities, in all cases that involve the construction of the Constitution of the State of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the State of Georgia or of the United States is drawn in question; and, until otherwise provided by law, in all cases respecting title to land; in all equity cases; in all cases which involve the validity of, or the construction of wills; in all cases of conviction of a capitol felony; in all habeas corpus cases; in all cases involving extraordinary remedies; in all divorce and alimony cases, and in all cases certified to it by the Court of Appeals for its determination. It shall also be competent for the Supreme Court to require by certiorari or otherwise any case to be certified to the Supreme Court

from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court. Any case carried to the Supreme Court or to the Court of Appeals, which belongs to the class of which the other court has jurisdiction, shall until otherwise provided by law, be transferred to the other court under such rules as the Supreme Court may prescribe, and the cases so transferred shall be heard and determined by the court which has jurisdiction thereof. The General Assembly may provide for carrying cases or certain classes of cases to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals. The Supreme Court shall also have jurisdiction of and shall decide cases transferred to it by the Court of Appeals because of an equal division between the Judges of that Court when sitting as a body for the determination of cases (Codification or Article VI, Sec. II, Paragraph IV of the Constitution of Georgia.

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Georgia Code 2-3708. (6506) Paragraph VIII. Court of Appeals.—The Court of Appeals shall consist of the Judges provided therefor by law at the time of the ratification of this amendment, and of such additional Judges as the General Assembly shall from time to time prescribe. All terms of the Judges of the Court of Appeals after the expiration of the terms of the Judges provided for by law at the time of the ratification of this amendment, except unexpired terms, shall continue six years and until their successors are qualified. The times and manner of electing Judges, and the mode of filling a vacancy which causes an un-

expired term, shall be the same as are or may be provided for by the laws relating to the election and appointment of Justices of the Supreme Court. The Court of Appeals shall have jurisdiction for the trial and correction of errors of law from the Superior courts and from the City Courts of Atlanta and Savannah, as they existed on August 19, 1918, and such other like courts as have been or may hereafter be established in other cities in all cases in which such jurisdiction has not been conferred by this Constitution upon the Supreme Court, and in such other cases as may hereafter be prescribed by law; except that where a case is pending in the Court of Appeals and the Court of Appeals desires instruction from the Supreme Court, it may certify the same to the Supreme Court, and thereupon a transcript of the record shall be transmitted to the Supreme Court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the question so certified; and the Court of Appeals shall be bound by the instruction so given. But if by reason of equal division of opinion among the Justices of the Supreme Court no such instruction is given, the Court of Appeals may decide the question. The manner of certifying questions to the Supreme Court by the Court of Appeals, and the subsequent proceedings in regard to the same in the Supreme Court, shall be, as the Supreme Court shall by its rules prescribe, until otherwise provided by law. No affirmance of the judgment of the court below in cases pending in the Court of Appeals shall result from delay in disposing of questions or cases certified from the Court of Appeals to the Supreme Court, or as to which such certificate has been required by the Supreme Court as hereinbefore provided. All writs of error in the Supreme Court

or the Courts of Appeals, when received by its clerk during a term of the Court and before the docket of the term is by order of the Court closed, shall be entered thereon, and when received at any other time, shall be entered on the docket of the next term; and they shall stand for hearing at the term for which they are so entered, under such rules as the Court may prescribe, until otherwise provided by law. The Court of Appeals shall appoint a clerk and a sheriff of the court. The reporter of the Supreme Court shall be reporter of the Court of Appeals until otherwise provided by law. The laws relating to the Supreme Court at to qualifications and salaries of Judges, the designation of other Judges to preside when members of the Court are disqualified, the powers, duties, salaries, fees and terms of officers, the mode of carrying cases to the Court, the powers, practice, procedure, times of sitting, and costs of the Court, the publication of reports of cases decided therein, and in all other respects, except as otherwise provided in this Constitution or by the laws as to the Court of Appeals at the time of the ratification of this amendment, and until otherwise provided by law, shall apply to the Court of Appeals so far as they can be made to apply. The decisions of the Supreme Court shall bind the Court of Appeals as precedents. The Court of Appeals shall have power to hear and determine cases when sitting in a body, except as may be otherwise provided by the General Assembly. In the event of an equal division of Judges on any case when the Court is sitting as a body, the case shall be immediately transferred to the Supreme Court. (Codification of Article VI, Sec. II, Paragraph VIII of the Constitution of Georgia).

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Georgia Code 6-1607. (6203; 1101 P. C.) What appellate court shall decide.—The Supreme Court or the

Court of Appeals shall not decide any question unless it is made by a specific assignment of error in the bill of exceptions, and shall decide any question made by such assignment. (Acts 1882-3, p. 107; 1899, p. 114; 1892, p. 113.)

RULES OF COURT OF APPEALS CODIFIED AS:

Georgia Code 24-3643. Rule 43. Motion for rehearing, when and how made.—No motion for a rehearing will be considered by this Court unless the same is filed in the office of the clerk thereof in duplicate (the original and a carbon copy being sufficient), during the term at which the judgment sought to be reviewed was rendered, and before the remittitur has been forwarded to the clerk of the trial court. Motions must be plainly written or printed upon white paper, not so thin as to be transparent, with ample spacing between the lines. Single-spaced typewritten matter is prohibited. Writing with pen or typewriter must be on only one side of each sheet, and a margin of at least one and one half inches shall be left at the top an don left side of each page. If authority is cited in the motion, it shall be by name of case as well as by volume and page of report.

(a) The Court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of 10 days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than 10 days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within 10 days from the rendition of the de-

cision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

(b) No motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the Court, although the clerk may receive any such later motion and deliver the same to the Court for action.

(c) A rehearing will be granted, on motion of the losing party, only when it appears that the Court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the Court, or what provision of law or controlling authority has been erroneously construed or misapplied.

(d) There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the Court he believes that such a fact, statute, or decision, has been overlooked, or that such provision of law or controlling authority has been erroneously construed or misapplied. The motion, when filed, shall show that a copy thereof has been served on opposing counsel who may thereupon file a brief on the questions raised.

(e) If the movant should desire to furnish additional copies of the motion or briefs of law for each of the Judges, the same must be filed with the Clerk of Court of Appeals for delivery to the Judges. Such copies of the motion and brief should not be mailed or sent directly to the Judges.

(f) If, upon the consideration of a motion for a rehearing, this Court should be of the opinion that its judgment as rendered is correct, but that some revision of the opinion would be appropriate, this Court may, in its discretion, and according to its power as heretofore exercised, revise the opinion accordingly, without granting a rehearing; in which event the Court shall so advise the clerk, who shall then promptly notify counsel that alterations have been made.

(g) After motions for rehearing have been disposed of, or in the absence of such motion, the Court or the Judges may revise opinions in accordance with the Code, 6-1606.

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Georgia Code 24-3646. Rule 46. Issuance of remittitur on refusal of certiorari or affirmance of judgment by Supreme Court.—Where a judgment of this Court is affirmed by the Supreme Court, or where the writ of certiorari is denied, the remittitur of this Court shall issue immediately upon the filing of the remittitur from the Supreme Court. No entry upon the minutes shall be made.

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Georgia Code 26-3647. Rule 47. Duty of clerk on reversal of judgment or giving of instructions by Supreme Court.—Where a judgment of this Court is reversed, or where instruction is given by the Supreme Court, the Clerk, upon receipt of the remittitur, shall bring the matter to the immediate attention of the division which rendered the decision complained of for such further order as may be proper in the case.

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Georgia Code 24-3649. Rule 49. Holding remittitur for more than 10 days, effect.—Where a

remittitur has been held for more than 10 days from the date of the judgment consequent upon the filing of a notice of intention to apply for the writ of certiorari, the clerk is prohibited from thereafter filing a motion for a rehearing.

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Georgia Code 24-3801. (6099) Time and place of session. The Supreme Court shall sit at the seat of Government. Its terms shall be as follows: January term beginning the first Monday in January; April term beginning the first Monday in April; September term beginning the first Monday in September. Each term shall continue until the business for that term has been disposed of by the Court: Provided, that unless sooner closed by order of the Court the September term shall end on December 20th and the April term shall end on July 31st: Provided further, no judgment, other than judgment on motion for a rehearing, shall be rendered during the last fifteen days of any term. (Act 1845, Cobb, 448. Acts 188405, p. 45; 1935, pp. 161, 162.)

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Georgia Code 24-3509. Terms of Court of Appeals. —The terms of the Court of Appeals shall be the same as the terms of the Supreme Court. (Acts 1935, pp. 161, 162.)